

D.P.U. 96-100

Investigation by the Department of Public Utilities upon its own motion commencing a Notice of Inquiry/Rulemaking, pursuant to 220 C.M.R. §§ 2.00 et seq., establishing the procedures to be followed in electric industry restructuring by electric companies subject to G.L. c. 164.

ORDER COMMENCING NOTICE OF INQUIRY ("NOI")/RULEMAKING
AND SETTING A PROCEDURAL SCHEDULE

I. INTRODUCTION

On August 16, 1995, the Department of Public Utilities ("Department") issued its Order in Electric Industry Restructuring, D.P.U. 95-30, setting forth principles for a restructured electric industry and for the transition to that stage, and establishing a schedule for electric utilities to file restructuring proposals. On February 13, 1996, the Division of Energy Resources ("DOER") filed its plan for restructuring the electric industry. On February 16, 1996, the Department received restructuring plans from four companies, Boston Edison Company, Eastern Edison Company, Massachusetts Electric Company, and Western Massachusetts Electric Company; the four utility proposals were docketed, respectively, as D.P.U. 96-23, D.P.U. 96-24, D.P.U. 96-25, and D.P.U. 96-26. On March 4, 1996, the Department issued a draft proposed schedule and, on March 6, 1996, held a consolidated procedural conference to receive comment on the proposed schedule.¹ The purpose of the procedural conference was to determine the optimal process and schedule for the next phase of electric industry restructuring. Twenty-two persons provided oral

¹ On February 16, 1996, the Department issued Orders of Notice in each of the company cases, requiring each company which filed a restructuring plan to publish notice of the procedural conference as well as notice of a public hearing in newspapers of general circulation in its service territory, and requiring each company to provide this notice to the service list in D.P.U. 95-30.

comments at the procedural conference² and fifteen persons filed written comments with the Department by the established deadline of March 7, 1996.³

Commenters raised the following issues for Department consideration: whether a generic adjudication versus a rulemaking was required by law and which is the optimal process to employ; whether the Department should issue draft rules or a more detailed vision statement before further filings or hearings; whether the draft proposed schedule was too aggressive; whether additional time is required for (1) comment after the Department issues draft rules, (2) negotiations among the parties, and (3) compliance filings; whether discovery should be allowed in the company-specific cases while the generic case is ongoing; whether the Department should prioritize the issues and initially address unbundling of rates; whether load aggregation, quality and reliability of service, and equity among customer classes should be added as issues; whether cross-examination

² The speakers included: State Representative Linda Teagan; Robert H. Ladino; and representatives on behalf of the Town of Lexington; Renewable Energy Technology Analysis Project at Pace University Law School; Boston Edison Company; Division of Energy Resources; Barnstable County Commission; the Attorney General of the Commonwealth of Massachusetts; Enron Capital & Trade Resources; Associated Industries of Massachusetts; Massachusetts Municipal Wholesale Electric Company; Fitchburg Gas and Electric Light Company; Conservation Law Foundation; Massachusetts Electric Company; COM/Electric; Natural Gas Clearinghouse, Utilicorp United, Eastern Group, Direct Energy, and Pan Energy; Western Massachusetts Electric Company; The Energy Consortium; Wheeled Electric Power Company; Competitive Power Coalition of New England, Inc.; National Consumer Law Center; and the Union of Concerned Scientists.

³ Comments were received from Enron Capital & Trade Resources; Western Massachusetts Electric Company; the Attorney General; Fitchburg Gas and Electric Light Company; COM/Electric; General Electric et. al.; Retailers Association of Massachusetts; Conservation Law Foundation; Boston Edison Company; Massachusetts Municipal Wholesale Electric Company; Competitive Power Coalition of New England, Inc.; Thomas C. Norton, Senate Majority Leader; Division of Energy Resources; Barnstable County Commission; and Town of Lexington.

should be allowed in the generic proceeding; when non-utility plans should be filed; whether the issue of performance-based ratemaking should be deferred in order to streamline the restructuring process; and how to increase public awareness, education and input in the restructuring process.

The Department appreciates all of the comments received and, in response, has reconsidered and revised the procedural schedule to incorporate many of the suggestions. We believe that the process and schedule included herein is administratively efficient, that it will aggressively advance the restructuring of the electric industry, and that it will provide ample opportunity for industry and public input.

II. ADJUDICATION VERSUS RULEMAKING

As a threshold matter, we address the issue of whether we are required by law to conduct an adjudication rather than a rulemaking in this proceeding. The Supreme Judicial Court has held that the "choice between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency," Borden, Inc. v. Commissioner of Public Health, 388 Mass. 707, 716 (1981). The State Administrative Procedure Act defines a regulation as a "requirement of general application and future effect." G.L. c. 30A, §1 (5). The Department is required to conduct an adjudicatory proceeding when the "legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing." G.L. c. 30A, § 1 (1). The Supreme Judicial Court has applied a three-pronged analysis in making this determination. "First, are the 'legal rights, duties or privileges of specifically named persons' at issue? If so, does any provision of the General Laws require that such rights, duties or privileges be determined after an agency hearing? If not, does any constitutional provision require that such

rights, duties, or privileges be determined after an agency hearing?" Borden, Inc.v. Commissioner of Public Health, 388 Mass. at 716.

This is a proceeding to establish the structure of a competitive electric industry, and to create a set of rules of general applicability and future effect for the industry as a whole. While the Department's regulations will affect the utility companies, this does not constitute an effect upon "specifically named persons" within the meaning of G.L. c. 30A, as that term has been defined by the courts. See Cambridge Electric Light Co. v. Department of Public Utilities, 363 Mass. 474, 486 (1973); see also Borden, Inc. v. Commissioner of Public Health, 388 Mass. 707; compare Madera v. Secretary of the Executive Office of Community Affairs and Development, 418 Mass. 452 (1994). Even if the legal rights, duties or privileges of specifically named persons were at issue in this proceeding, there is no statutory or constitutional requirement for a hearing. There is no provision of the General Laws which requires an agency hearing in these circumstances, nor has any been alleged. Similarly, although two utilities have asserted that the proposed rules will create significant impacts on the utilities, warranting adjudication of the issues, they have not explicitly made a constitutional claim for adjudication. Any constitutional claim such as confiscation of property would be premature. At this time, it is speculative to assume that the regulations will result in confiscation of utility property. See Cambridge Electric Light Co. v. Department of Public Utilities, 363 Mass. at 488, 498-499. In addition, the procedural schedule provides for company-specific adjudications after the generic proceeding is concluded, in order to determine how the generic rules should be applied to each utility. The company-specific adjudications, with the panoply of procedural rights that accompanies such proceedings, would

determine, among other things, fact-dependent issues such as the level of stranded costs for a particular utility. See Borden, Inc. v. Commissioner of Public Health, 388 Mass. at 717.

The Department believes that the determination of complex policy issues of general application and prospective effect upon the utility industry is best accomplished through a rulemaking. Such a process allows for greater openness and accessibility to all stakeholders, an opportunity for greater public involvement and education, and the expeditious resolution of the structural issues inherent in restructuring the electric industry. For the above reasons, we choose to proceed in the next phase of electric restructuring by rulemaking.

III. NOI/RULEMAKING

The Department hereby opens an NOI/Rulemaking which will be docketed as D.P.U. 96-100. Pursuant to 220 C.M.R. § 1.10(3), the Department incorporates by reference the restructuring proposals filed by Boston Edison Company, Eastern Edison Company, Massachusetts Electric Company, Western Massachusetts Electric Company, and the Division of Energy Resources into this docket; all filings received in D.P.U. 95-30 after the August 16, 1996 issuance date of that Order are also incorporated by reference in this NOI/Rulemaking and no further filings will be accepted in D.P.U. 95-30, which is terminated by this ruling. The scope of the NOI/Rulemaking proceeding will focus on issues pertaining to (1) market structure, (2) market power, (3) transmission, (4) distribution, (5) stranded cost calculation and recovery mechanism, (6) rate unbundling, (7) performance-based ratemaking, (8) environmental regulation and demand-side management, (9) default service, (10) universal service, (11) the effect of restructuring on municipal electric companies, and (12) the local and utility tax impacts of restructuring.⁴ The Department proposes to issue rules in those areas where the Department has

jurisdiction. In those areas where the Department does not have jurisdiction, or where jurisdiction may be shared, the Department intends to provide guidance by developing a set of recommendations for consideration by the utilities and the appropriate legislative and regulatory authorities. The elements of this NOI/Rulemaking are as follows.

The Department will proceed sequentially, conducting the NOI/Rulemaking first and then, upon issuance of final rules, going forward with all company-specific adjudications. The schedule provides for comments which analyze and propose changes to the five plans already presented to the Department. Comments should be limited to 20 pages and filed with the Department's Secretary by April 12, 1996. As outlined below, there will be ample opportunity for additional public comment after the Department's draft rules are issued. The discovery and questioning of witnesses in the generic proceeding will be conducted by the Department. Commenters may propose questions to be proffered by the Department in their comments submitted on May 24 (see below). In response to the requests that the Department provide more specific guidance on the framework of a restructured electric industry, the Department will issue draft rules with an explanatory statement on May 1, 1996.

In May, the Department will conduct evening public hearings throughout the Commonwealth to receive public comment on the Department's draft rules. In order to ensure public education and opportunities for public input throughout the restructuring process, the Department has established a Consumer Education Advisory Task Force to be coordinated by Claudine Langlois, Director of the Consumer Division of the Department. The Department

⁴ The issues of load aggregation, quality and reliability of service, and equity among customer classes can be raised and addressed under the above issues.

encourages broad participation in this effort. Anyone interested in participating in the Consumer Education Advisory Task Force should contact Ms. Langlois at (617) 727-3531/3532.

The schedule also allows any interested person to file comments, alternative rules, suggested hearing questions and requests to present oral testimony at hearings, for our consideration in adopting final rules. Such documents shall be filed with the Department Secretary by May 24, 1996. The Department will conduct hearings at its offices from June 10, 1996 through July 19, 1996; no hearings will be held the week of July 1-5. The Department will accept reply comments and/or recommended changes to the draft rules filed on or before August 2, 1996. Final regulations will be filed with the Secretary of State on September 20, 1996, for publication and effect on October 4, 1996.

The company-specific adjudications will begin after the final regulations are filed with the Secretary of State on September 20. The adjudication schedule directs all companies to file revenue-neutral unbundled rates on October 7, 1996, in compliance with the generic order; this directive includes any companies which have not yet filed restructuring plans, and supersedes all other current filing dates for companies which did not file plans on February 16, 1996. On October 11, 1996, the Department will hold a joint procedural conference to set a schedule to investigate and implement these unbundled rates. The goal of these initial company proceedings is to establish, in the period from January through March 1997, revenue-neutral unbundled rates for all electric companies. The Department will also hold a joint procedural conference in January 1997 to set the schedule and procedure for all electric companies to comply with the generic rules other than those on revenue-neutral unbundled rates. Finally, the target date for all electric companies to implement retail choice is set at January 1, 1998. Attached as Appendix A is a

comprehensive procedural schedule, covering both the NOI/Rulemaking and the company-specific adjudications.

Attached as Appendix B is the service list for D.P.U. 96-100. The list includes the names of those on the service lists of D.P.U. 95-30 and the procedural conference on March 6, 1996, and those who have requested to be added to the electric industry restructuring service list as of March 15, 1996. The Department requests that persons review the list and notify the Hearing Officers listed below by April 19, 1996 of any additions, deletions or corrections to be made; where possible, please limit your listing to one mailing address. The service list for D.P.U. 96-100 is established for Department use, to notify interested persons of actions in the case. Given the extensiveness of the list, the Department will not require participants to serve their filings to those on the list. The Department is investigating options to make all filings available through electronic means and we may subsequently require that all participants, to the extent possible, submit their filings in electric format in addition to the required paper submission. We will keep participants informed of our progress on this matter. Persons are required to serve fifteen (15) copies of their comments, responses to discovery, or any other filing on the Department. Copies of filings may be obtained, for a reproduction charge, from American Speedy Printing, 4 Somerset Street, Boston (617) 523-3355. In addition, all filings will be available for inspection at the Department during regular business hours.

The Hearing Officers assigned to the NOI/Rulemaking are Thomas Bessette and Alicia Matthews. If you have any questions regarding this procedural schedule, please contact one of these Hearing Officers at (617) 727-3500.

By Order of the Department,

John B. Howe, Chairman

Mary Clark Webster, Commissioner

Janet Gail Besser, Commissioner

**APPENDIX A
TIMETABLE**

I. GENERIC PROCEEDING - NOI/RULEMAKING

March 6	Consolidated Procedural Conference
March 7	Due date for comments on Draft Proposal
March 8	Notice of Proposed Regulations to Local Government Advisory Committee (per Executive Order # 145)
March 15	Procedural Ruling regarding legal process, schedule, level of participation and timing of filing of comments by participants
March 22	Notice to be filed with the Secretary of State - includes general substance of rulemaking (issues) and contemplates statement of Department explanatory statement/draft rules
April 5	Notice of rulemaking is published by the Secretary of State in the Massachusetts Register
April 12	Due date for comments analyzing and proposing changes to the five restructuring plans filed in February (20-page limit)
April-July	Discovery by Department only, as needed to inform the generic proceeding, including discovery on companies' filed revenue-neutral unbundled rates
May 1	Department issues explanatory statement and draft rules
May	Evening public hearings, for public comment on May 1 explanatory statement and draft rules
May 24	Due date for comments, alternative rules, suggested hearing questions and requests to present oral testimony at hearings, in response to May 1 Department statement/rules
June 10 - July 19	Department hearings (3 days/week; no hearings the week of July 1-5)
August 2	Due date for reply comments and/or changes to Department draft rules
September 20	Final regulations filed with the Secretary of State
October 4	Final regulations are published by the Secretary of State and become effective

TIMETABLE
II. COMPANY-SPECIFIC ADJUDICATIONS

March 5-13, 28	Public hearings on proposals including DOER's
March - September	Activity in NOI/rulemaking; company-specific cases to be taken up after completion of generic
September 20	Final regulations on generic issues filed with the Secretary of State
October 7	All companies file revenue-neutral unbundled rates, in compliance with the generic order, including those companies which have not yet filed plans (this date supersedes all current filing dates for companies which did not file February 16)
October 11	Joint procedural conference to set procedure to implement company-specific revenue-neutral unbundled rates
January-March 1997 rates	All companies establish revenue-neutral unbundled
January 1997	Joint procedural conference to set schedule and procedure for all electric companies to comply with the generic rules other than those on revenue-neutral unbundled rates
January 1, 1998	All companies implement retail choice